LAWS2010 - Administrative Law

Merits Review [Topic 2]

Commonwealth: Administrative Appeals Tribunal (AAT)

1. Nature: Merits review jurisdiction under more than 450 Cth statutes. Designed to ensure that citizen's reasonable grievances are resolved, and is designed to enunciate principles of sounds administration.
2. Objectives: Provide review mechanism that (a) is accessible; and (b) is fair, just, economical, informal and quick; and (c) is proportionate to the importance and complexity of the matter; and (d) promotes public trust and confidence in the decision-making of the Tribunal, etc. (per s 2A *AAT Act 1975* (Cth))
3. Procedure informal and quick: Tribunal aims to be informal, accessible, quick and not bound by evidence law (s33 *AAT Act*) but it has to have probative basis
4. Public unless otherwise: Hearings should be public (s35(1) *AAT Act*) unless orders for private hearing (s35(2) *AAT Act*), non publicised and non-disclosed (s35(3)-35(5) *AAT Act*)
5. Jurisdiction provided under enactment: AAT has jurisdiction to an appeal from a decision made, which purported to be made in exercise of powers under an enactment (s25(1) *AAT Act*)
6. Failure to meet time limit will be treated as a decision: s 25(5) of the AAT Act
7. Persons affected by decision may obtain reasons for decision: May request for a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and receive the statement within 28 days (s28 *AAT Act*)
8. Standing (who can apply): Any person or persons (including the Commonwealth) whose interests are affected by the decision (s27(1) *AAT Act*), or an organisation or association of persons whose interests are affected (s27(2) *AAT Act*)
9. Parties to proceed before Tribunal: People who will appear before the Tribunal include (a) any person who, being entitled to do so, has duly applied to the Tribunal for a review of the decision (b) the person who made the decision; (c) …under section 30A—the Attorney-General; and (d) any other person who made a party to the proceeding by the Tribunal on application (s30 *AAT Act*)
10. Review Considerations:
11. Goal is to provide the 'correct or preferable' decision: (*Drake*, Bowen CJ and Deane J)
12. Government policy ***should*** be considered ***but not bound***: When making a decision it ***should*** consider government policy, but is not strictly bound by it (*Drake No 2*, see below)
    a. Follow policy unless cogent reasons not to: Brennan J at 644-45: Desirability of consistency — while AAT was was free to depart from ministerial policy, should generally apply ministerial policy UNLESS the policy was unlawful or "there are cogent reasons to the contrary"
    b. Exception — Compulsory to consider government policy if statutorily binding: HOWEVER, the issues in *Drake* DOES NOT ARISE if government policy IS BINDING on the AAT
13. Time period up until the review acceptable: Review is not restricted at the time of the primary decision but includes all time up to the period the AAT is conducting its review (*Shi*)
    a. Must have regard best and most current information available: New, fresh, additional or different material that had been received by the Tribunal as relevant to its decision (Kirby J at [37], [41])
    b. Exception — Statutory limitation: However, if there is a statutory limitation that the decision be restricted to the material before the original decision-maker, it must be found in the legislation which empowered the primary decision maker to act (Hayne and Heydon JJ)
14. Fresh Perspective: A decision must bring a fresh perspective freed from prejudgments (*MZZW*)
    a. The Court **[60]**: 'Afresh' simply means 'with fresh eyes' and is intended to mean that a new decision-maker brings her or his own perspective
    b. Facts: Here the member transposed the previous findings and language into her findings and language regarding an asylum seeker application for review to Refugee Review Tribunal re: visa
15. Powers with orders: Section 43 *AAT Act*:
16. Binding or non-binding orders: Can affirm, vary, set aside, substitute decision or remit decision by the decision-maker with directions (binding) or recommendations (non-binding) (s 43(1) *AAT Act*)
17. AAT decision is deemed to be the decision of the original decision maker as from the date of the original decision. AAT may exercise all the powers and discretion conferred on the original decision maker for the purposes of reviewing a decision (s 43(6) *AAT Act*)
    a. Substitution is primary goal of appeal: Substitution rather than remission desired (*Shi*)
18. Appeals to FCA: A party to a proceeding before the Tribunal may appeal to the Federal Court, on a question of law, from any decision of the Tribunal in that proceeding (s 44(1) *AAT Act*)

Jurisdiction of the Courts [Topic 3 and 13]

1. Cth or NSW Public Power

1. **Refusal/Declaration, etc.** of **X person** application is made by **X person** of the **NSW/Commonwealth** under a **NSW/Commonwealth** Act. As such, she will be able to seek judicial review in… **determine which Court/Jurisdiction**

2. Privative Clause

2. Is there a **privative clause** [ouster/ 'stop dead' time limits / radical secrecy provision]?
   a. Ouster Clause: **X legislation** is attempting to oust the applicant, **X Person**, from seeking judicial review from the **X Court**. However, the privative clause **CANNOT** oust the constitutionally entrenched jurisdiction of the **X Court** and **X Person** is advised to apply under the entrenched review jurisdiction which requires the establishment of a jurisdictional error… [3]
      1) Ouster clauses that apply to **'decisions'** can be construed as only applying to '***valid* decisions'** rather than all '***purported*** decisions' - thus preserving judicial review for jurisdictional error (which are not treated as valid decisions), i.e. it only applies to non-JE decisions (at [80-81] in *Plaintiff S157/2002* (Cth); at [100] in *Kirk* (NSW))
      2) Example:
         a) NSW: In *Kirk*, s 179 *Industrial Relations Act* that a **decision** of the Industrial Relations Court – (1)"is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal" (5)"[t]his section extends to proceedings in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise"
   b. 'Stop Dead' Time Limit: **X legislation** is attempting to impose time-limits on applying for judicial review. Despite this, **X Person** is advised to argue that the inflexibility of the time limit is *incompatible and invalid* in its application to the entrenched review jurisdiction in its practical operation. **X Apply facts that it is inflexible**. Therefore **X Person** is required to apply under the entrenched review jurisdiction and establish a jurisdictional error… [3] *Bodruddaza*
      1) An inflexible time-limit on judicial review was *invalid* in its application to the entrenched review jurisdiction. Some judicial discretion must be allowed for vitiating circumstances to be considered (at [55] in *Bodruddaza*).
         a) Facts: An absolute maximum of 84 days, running from the date of notification of the decision – Court has no discretion to extend. Held to be inflexible and was imposing.
         b) Rationale: Sometimes the circumstances that point to JE are unknown and unknowable at that point in time (at [55-6]). Discretion is needed for cases where supervening events make it unjust to hold the applicant to the time-limit (at [57]).
   c. Radical Secrecy Provision: **X legislation** is attempting to deny the court to compel the product of certain information. Despite this, **X Person** is advised to argue that the **X law**, in its practical operation, denies **X Court** from exercising its entrenched jurisdiction and hence is *incompatible and invalid*. **X Apply facts that it is inflexible**. Therefore **X Person** is required to apply under the entrenched review jurisdiction and establish a jurisdictional error… [3] *Graham*
      1) Provision in *Graham v MIBP* (2017): Section 503A(2) "relevantly provides that the Minister cannot be required to divulge information which was relevant to the exercise of his power under s 501 to any person or to a court if that information was communicated by a gazetted agency on condition that it be treated as confidential." (at [3]), i.e information that is:
         a) Relevant to a visa cancellation decision – including one made by the Minister without providing a hearing to the visa holder;
         b) Provided to immigration by law enforcement, intelligence, or security agencies on the basis it would be treated as confidential information.
      2) Application: The provision 'strikes at the very heart of the review for which s 75(v) provides' (at [65]). Held to be invalid.
         a) At [54-9]: The provision removes ANY basis for the court, in reviewing the decision objectively, to draw inferences adverse to the Minister eg applying the 'no evidence' ground; assessing whether the opinion that enlivens the power was reasonably formed; assessing whether the discretion was exercised reasonably.
         b) The problem was the inflexibility of the ban, regardless of its importance (at [64]). It cannot operate "in practice to shield the" decision maker " from judicial scrutiny" [53]

3. Entrenched: If the private clause attempts to oust or restrict the exercise of judicial review jurisdiction…
   a. NSW: The privative clause **CANNOT** prevent the constitutionally entrenched jurisdiction of the NSW Supreme Court to grant prohibition, mandamus and certiorari for jurisdictional error (at [96], [98]-[99], [105] *Kirk* per Spigelman J referring to s 73 *Constitution*). This will occur if **X person** can establish that there is an exercise of NSW statutory or prerogative power to directly affect legal rights or impose liabilities. **X apply that it does affect legal rights**. This means that NSW Supreme Court's inherent supervisory jurisdiction will be available (*Supreme Court Act 1970* (NSW), ss 23, 65 and 69(3))
      i. In *Chase Oyster Bar* (2010), Spigelman CJ (at [5]) and Basten JA (at [66]) highlight that although adjudicators are not government officials they exercise powers under statute that are relevantly public, and hence amenable to judicial review
      ii. In *Hot Holdings* (1995), it was held that as the decisions were made within a statutory process and had a discernible effect in the decision making process, it will be subject to judicial review. [Topic 11]

iii. Non-entrenched: However, if it is a non-jurisdictional error, then the privative clause can oust JR (see *Kaldas*). Other elements of supervisory jurisdiction (especially certiorari for ELFR; also equitable remedies for Error of Law) are *not* entrenched by s 73 (at [100] in *Kirk*). No ADJR.

b. **Cth**: The clause **CANNOT** prevent the High Court's constitutionally-entrenched review jurisdiction to issue **X Choose one** s 75(v) relief for jurisdictional errors by an officer of the Commonwealth **OR** s 75(iii) judicial review remedies for jurisdictional error in the exercise of non-judicial powers by 'the Commonwealth' (*Plaintiff S157/2002* at para [98], [103]-[104])
   1) Officer of Cth: Section 75(v) entrenches review of purported decision by 'officers of the Cth', where there is an exercise of Cth power to affect rights/obligations, by an 'officer of the Commonwealth'. **X Apply**. [Section 3]
      i) Authority: s75(v): In all matters (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction
         1. Certiorari included: Certiorari is not mentioned but it is available as an ancillary to mandamus or prohibition (*Plaintiff S157/2002*, [80])
      ii) Criteria — Officer of the Commonwealth:
         1. Salary: Connotes appointment of an individual to a tenured office by the Cth, usually accepting a salary from the Commonwealth (*R v Murray and Cormie* (1916))
         2. Incorporated: Government entity that is *incorporated* is not an 'officer of the Commonwealth'
         3. Contractors: In *Offshore Processing Case*, the HCA did not decide whether contractors are 'officers of the Commonwealth'
   2) Cth party in law suit: Section 75(iii) would be available there is an exercise of Cth non-judicial power to affect rights/obligations by 'the Commonwealth'. **X Apply**. [Section 3]
      i) Authority: In all matters (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party; The High Court shall have original jurisdiction
      ii) Note: DIFFERS TO s75(v) as this provision does not define jurisdiction in terms of remedies.

ii. Non-entrenched: However, if it is a non-jurisdictional error, then the privative clause can oust *ADJR Act* at federal level

3. Sources of Jurisdiction

4. General source of the jurisdiction of the Court
   a. **NSW**: The NSW Supreme Court's inherent supervisory jurisdiction will be available (*Supreme Court Act 1970* (NSW), ss 23, 65 an 69(3)):
      i. … **in full**, as there is an exercise of public statutory power to directly affect legal rights or impose liabilities **X Given that Apply X Person's rights** . Therefore this engages the Supreme Court's inherent jurisdiction to grant mandamus, prohibition or certiorari for Jurisdictional Errors ['**JE**'], **OR**, certiorari for 'error of law on the face of the record' ['**ELFR**'] (*Kirk*).
         1) Adjudicators are public: In *Chase Oyster Bar* (2010), Spigelman CJ (at [5]) and Basten JA (at [66]) highlight that although **adjudicators** are not government officials they exercise powers under statute that are relevantly public, and hence amenable to judicial review
         2) Decisions in statutory process has effect: In *Hot Holdings* (1995), it was held that as the decisions were made within a statutory process and had a discernible effect in the decision making process, it will be subject to judicial review [Topic 11]:
            a) Facts: Everything that the mining warden determined fed into the decision making of the Minister, and as it was a precondition, the preliminary findings provided sufficient effect on determining the legal rights and obligations
      ii. … **in part**, if there is an exercise of statutory function that does not directly affect legal rights or impose liabilities **X Given that Apply** BUT does have a public character that attracts judicial review principles **X Given that Apply** (i.e. inherent jurisdiction to grant **EQUITABLE remedies**).
         1) In *Ainsworth* (1992) the report had no legal effect and hence was not subject to judicial review. The Courts however allowed Ainsworth to sue for defamation and provide equitable remedies due to the lack of procedural fairness exercised before making these findings.
            a) Facts: Appellants were poker machine manufactures → Criminal Justice Commission established under the Criminal Justice Act delivered a report that ascribed certain conduct to the appellants in highly critical terms → Appellants sought certiorari or mandamus.
      iii. Appeals on Question of law
         1) Remedies limited to deciding whether or not there has been a legal error, then set a decision and remit

Procedural Fairness — Content of the Hearing Rule [Topic 6.2]

Considerations Relevant to the Content of Procedural Fairness

1. General: What matters depends includes the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting (*Haoucher* (1990)) and this can fluctuate during the course of particular decision making (*Aala* (2000)). It is noted that breach of procedural fairness is considered a jurisdictional error subject to materiality (*SZMTA* [2019]). **X Apply whether there has been material breach/ Apply subject-matter/nature, etc.**
2. What would a "hearing" normally entail?:
   a. Physical hearing not absolutely necessary: An actual hearing may not be necessary as vast majority of administrative decision do not (French J in *Chen v Minister for Immigration* (1993))
   b. Be given notice: that a decision has been made
   c. Be made aware: of the information on which the decision is to be based and any critical issues, although this does not necessitate a "running commentary" nor the stating of the obvious
   d. Not be misled as to the "evidence: that would be led or that will be taken into account" and
   e. Be given a reasonable opportunity to explain: perhaps in writing or orally, in the proceedings in question why a decision favourable to them should be made.

Adequacy of Disclosure

3. **Procedurally fair**:
   a. Disclose the case made against them: *Kanda v Government of Malaya* [1962]
   b. Disclose the particular acts, matters or things alleged: *Johnson v Miller* (1937)
   c. Disclose any change in procedural context in which opportunity to present evidence and make submissions is routinely afforded: *SZMTA* [2019]
   d. Assuming access did not deprive opportunity submit evidence or to review report: *SZMTA* [2019]
      i. Facts: Dept of Immigration publishes data on its website by mistake it publishes identities of 9,258 applicants for protection visas
   e. Failure to give opportunity to make a submission on a point that would not have changed the actual decision: *Fares Meat and Livestock Co Pty Ltd* (1990)
   f. Failure to give opportunity on a point would have been decided against the applicant: *Stead v State Government* (1986)
   g. Same result was reached on a completely independent point that was unaffected by the natural justice breach: (*Fares Meat and Livestock Co Pty Ltd* (1990)
   h. Failure to disclose information in light of **national security**: *Leghaei* [2005]
      i. National security may make it impossible to disclose the grounds on which the executive propose to act (at [48]). If balance is found in favour of national security, it may be that procedural fairness obligations are reduced to "nothingness" (at [51]). Primary judge was right to strike the balance in favour of the protection of the public interest in national security (at [52])
   i. No requirement to provide running commentary or settling issues in advance: in *Bond v ABT (No 2);* at [48] in *SZBEL* (2006)

4. **Procedurally Unfair**:
   a. Failure by Tribunal to disclose an event that alters 'the procedural context in which an opportunity to present evidence and make submissions is ***routinely*** afforded' (at [29] in *SZMTA* [2019]; *WZARH*)
      i. Failure to disclose the fact that Secretary has made a public interest immunity claim: (*SZMTA*)
   b. Failure to disclose adverse statements to the applicant: Credible, relevant and significant information needs to be disclosed to provide the applicant with an opportunity to deal with them (*Kioa* at 615)
   c. Failure to disclose critical issues to the applicant: Tribunal has to make it **clear** that issues are in doubt (at [47] in *SZBEL*) and that they are determinative issues arising in relation to the decision under review (at [44] in *SZBEL*)
   d. Failure to make a determination as to whether information is "credible, relevant and significant" before the final decision: This must be determined before the final decision is reached so notice must be given. Decision-maker cannot dismiss the information and not give weight to it (at [17] in *VEAL*)
      i. Just because no weight given **DOES NOT MEAN** that there is no obligation to inform (at [18])
   e. Failure to disclose confidential information that is critical and adverse: Tribunal is not bound to give a copy of the letter or inform of the writer as it would be no significance to the public interest in the proper administration of the Act (at [29] in *VEAL*), though will have to outline in general substance of the allegations made in the letter (at [7] in *VEAL*)